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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

~~No. 472~~ 71 - 472

ROBIN DUGAN, an infant, by DONALD DUGAN, her Guardian *ad Litem,* and DONALD DUGAN, individually,

*Petitioners,*

*vs.*

JACK DIEBER,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Jack Dieber (hereinafter referred to as the "respondent"), submits this brief in opposition to the petition for writ of certiorari filed herein by the petitioners. The petitioner, Robin Dugan, will be referred to hereinafter as the "petitioner."

The respondent takes the position that, in the first place, no constitutional question is presented by the petitioner and that, in any event, the question she seeks to raise is unsubstantial.

## The Proceedings in This Action in the New York Courts

This litigation arises from an accident that occurred on July 31, 1959. At that time, as the record shows, the petitioner ran out from between parked cars across a one-way Brooklyn street from a point in the middle of the block and came in contact with the respondent's automobile. The case was tried twice before a jury and after each trial the jury returned a verdict in favor of the respondent. The judgment entered in favor of respondent upon the jury's verdict at the first trial was reversed by the Appellate Division, Second Department, with an opinion that is reported in 32 A. D. 2d 815-816 (decided June 18th, 1969). The appellate court granted a new trial to the petitioner upon the ground that the Trial Judge had committed reversible error in the admission and exclusion of evidence and in certain of his instructions to the jury. The decision of the Appellate Division directed the following disposition of the appeal (page 815 of 32 A. D. 2d): "Judgment reversed, on the law and in the interests of justice, a new trial granted on the issue of liability only, with costs to abide the event." Petitioner accepted that decision. She did not seek a resettlement of the order of the Appellate Division which had limited the new trial to the issue of liability only but proceeded to try the case a second time pursuant to that order. At this second trial, her counsel offered to introduce medical proof to show the extent of her injuries as bearing upon the issue of liability but the Trial Judge ruled that he was bound by the order of the Appellate Division and on that basis excluded the proffered medical proof. When this second jury returned a verdict in the respondent's favor, the petitioner appealed again to the Appellate Division, Second Department. On that appeal she

submitted a forty-three page brief, containing fourteen points, on the basis of which she argued, by the way, not that she should have a new trial, but that the Appellate Division should direct a verdict in her favor. Presumably, her counsel had thought better of bringing the facts of this particular case before another jury for consideration.

Petitioner's brief in the Appellate Division contained the same garbled and absurdly distorted statement of the record that appears in her papers in this Court. For instance, her counsel argues in her application for certiorari that it was unjust to hold the petitioner responsible for contributory negligence because the petitioner is really dead—although, at last reports, the petitioner was very much alive—and she disposes of the respondent's testimony, at least to her own satisfaction, by characterizing his testimony (page 45 of her petition in this Court) as comparable to "* * * diarrhea of the mouth." This kind of offensive language has characterized her papers at every stage of this proceeding. Her premise seems to have been that abuse of the respondent, of his attorneys and of the Trial Judge, is a substitute for a meritorious cause of action.

Thus, in the present instance, it is impossible to tell from the papers submitted herein by counsel for petitioner the precise nature of the constitutional question that she raised in the New York Courts. In her forty-three page brief in the Appellate Division, Point VIII, among her fourteen points, makes a reference to the petitioner's alleged "constitutional rights." In this connection, Point VIII of her brief in the Appellate Division reads, in full, as follows:

"POINT VIII

A TRIAL LIMITED TO LIABILITY ONLY WITH REFUSAL TO ALLOW PLAINTIFF TO SHOW THE NATURE OF INJURIES AS PROOF OF SPEED AND IMPACT, DEPRIVED THE INFANT OF A FULL AND FAIR TRIAL AND THEREFORE OF HER CONSTITUTIONAL RIGHTS.

The trial court precluded the plaintiff's attorney from alluding to any injuries sustained by the infant, in this case, tried on liability only and no eye witness but the defendant, on the grounds that this was the structure and the interdiction of the Appellate Division. A careful reading of the opinion in *Dugan* v. *Dieber*, 302 A.D. 423 shows no mention of the trial court's contention in this area.

In *Bennetti* v. *N. Y. City Transit Authority*, 22 N.Y. Reports 2nd Sec. 742, the court held:

> "It is manifest from the record that the speed of the vehicles were an essential element of the Plaintiff's case on the issue of due care. The exclusion of evidence of injuries to passengers on the bus was reversible error that such evidence had a direct bearing on the force of the impact and the relative speed of the vehicles involved.

This case having been tried on liability alone and the jury not being able to see any evidence of injuries, 11 years later, came to the erroneous conclusion that the car actually was stopped on impact. Had they known that the distance the child was thrown resulted in traumatic epilepsey, they could better judge the speed of the defendant. Therefore, even if there were no bias on the part of the court, there still was an error of law and

there should be a reversal of the jury's verdict and a reversal of the trial court's refusal to reverse pursuant to the motion made under C. P. L. R. 4404."

The foregoing is the entire "Constitutional" issue raised by the appellant in the State Court.

The Appellate Division unanimously affirmed the judgment in favor of the respondent and denied petitioner's motion for leave to appeal to the Court of Appeals. Petitioner also took a direct appeal as of right to the Court of Appeals, a procedure that is available to an appellant only if a substantial constitutional question under the State or the Federal Constitution is directly involved in the case. On respondent's motion the Court of Appeals dismissed the appeal taken by petitioner as of right and subsequently denied her motion for leave to appeal.

Neither in her application in the Appellate Division for leave to appeal to the Court of Appeals nor in her application in the Court of Appeals for leave to appeal to that Court, nor in her papers opposing the respondent's motion in the Court of Appeals to dismiss the appeal she had taken there as a matter of right, did petitioner raise the question of the constitutionality either under the State or under the Federal Constitutions of Section 603 of the Civil Pracice Law and Rules, the argument upon which she now seeks to peg her petition for certiorari in this Court.

## The Respondent's Contention in Opposition to This Petition for Certiorari

The respondent contends that the petitioner did not raise in the State Court any question under the Federal Constitution and that the question which she now seeks to argue is unsubstantial.

A copy of the record on appeal in the Appellate Division, certified by the counsel for appellant, is submitted herewith.

## POINT I

**Petitioner did not raise any constitutional question in the State Court; the question which she now seeks to argue is unsubstantial.**

In Point VIII of her brief in the Appellate Division, the first argument made by petitioner is that the Trial Court, when it ruled that the Appellate Division had limited the second trial to the issue of liability only, misread the Appellate Division's opinion reversing the judgment in favor of respondent upon the first trial. Thus petitioner argued at page 29 of her brief in the Appellate Division that "a careful reading of the opinion in *Dugan* v. *Dieber,* 302 A. D. 423 (the correct citation is 32 A. D. 2d 815) shows no mention of the trial court's contention in this area." Presumably, the foregoing was intended to assert that the Trial Court misunderstood the Appellate Division's opinion directing a new trial. The obvious answer to that argument is that the Appellate Division stated, in so many words, that a new trial was granted "on the issue of liability only, * * *" (page 815 of 32 A. D. 2d).

Secondly, under Point VIII of her brief in the Appellate Division, the petitioner called the Court's attention to a decision by the New York Court of Appeals in *Bennetti* v. *New York City Transit Authority,* 32 N. Y. 2d 742 (1968). The *Bennetti* case involved not a constitutional question but solely a question of State law concerning the admissibility of evidence. In the *Bennetti* case the Court of Appeals held that in a motor vehicle col-

lision case where the record indicated that the speed of the vehicles involved in the collision was an essential element of the plaintiffs' case, the Trial Court was wrong in excluding evidence of injuries to the plaintiffs; the Court's theory was that such evidence of injuries had a direct bearing on the question of the force of the impact and the relative speed of the vehicles that were involved. Thus, the *Bennetti* case shows that the highest Court in New York is well aware that, in particular instances, it is prejudicial to a plaintiff's rights to exclude medical evidence on the issue of liability.

More than that, the Appellate Divisions are well aware that in certain situations a plaintiff would be prejudiced if his offer of medical evidence were excluded upon a trial limited to the issue of liability.

In *Culley* v. *City of New York*, 25 A. D. 2d 519-520 (1st Dept., 1966), the Appellate Division, First Department, in ordering a new trial in a negligence action, had the following to say (page 520 of 25 A. D. 2d):

> "The practice of holding separate trials in negligence actions—first on liability, and then on damages—is not to be discouraged. However, where the nature of the plaintiff's injuries has an important bearing on the issue of liability, a separate trial should not be ordered. Such proved to be the case here. In order for plaintiff to prove his case he must show that his injuries were in fact caused by defendant's negligence. We cannot draw that conclusion from the record in this case. Essential to such determination is the nature and type of injuries. It is for that reason that we direct that liability and damages should be tried together on the retrial."

The Appellate Division, Second Department, took a similar position in the case of *Williams* v. *City of New York*, 36 A. D. 2d 620 (decided February 1st, 1971). In that case the appellate court, in granting a new trial, said (page 620 of 36 A. D. 2d):

> "In our opinion, under the circumstances of this case, the issue of liability, insofar as it involved the question of the use of excessive force by the police officer, accepted by the trial court and the litigants as a question in the case, and the issue of the injuries sustained and attributable to such excessive force, were inseparable. In that perspective, the extent of such injuries constituted admissible evidence insofar as it was probative of the use of excessive force and the exclusion of such evidence was tantamount to a denial of a fair trial to plaintiff (*Gasoline Prods. Co.* v. *Champlin Co.*, 283 U. S. 494, 500). Accordingly, it is our view that a departure from the authorized and accepted practice of separately trying issues of liability and damages was warranted and that one trial of these combined issues is indicated in the proper exercise of discretion (see *Culley* v. *City of New York*, 25 A D 2d 519)."

Moreover, an order directing a separate trial, made by the Court of first instance over objection of plaintiff, is appealable by the plaintiff to the Appellate Division; he does not have to await the result of a trial in which his medical proof will be excluded (*Dillenbeck* v. *Bailey*, 32 A. D. 2d 735 (4th Dept., 1969).

Therefore, if counsel for the petitioner believed that she needed medical evidence to prove her case on the issue of liability, a timely application to the Appellate Division to resettle its order would have been an available

remedy. Instead, she proceeded to try her case pursuant to the appellate court's ruling limiting her to the liability issue. Under those circumstances, the Trial Judge's hands were tied because he was bound by the ruling of the higher Court.

Furthermore, counsel for petitioner misstates the record when she argues, in effect, that the respondent himself was the only available eyewitness to the accident. The record indicates that, as a matter of fact, other eyewitnesses were available but that the petitioner did not produce them. That was the point of the argument made by trial counsel for respondent in his summation with respect to the petitioner's so-called "burden of proof," a garbled version of which summation is given in the petitioner's papers in this Court at page 19.

Petitioner also makes an incidental argument that she was deprived of her right to a fair trial because she was charged with the burden of proving her own freedom from contributory negligence. That contention does not raise an issue under the Federal Constitution, but it might be pointed out—although one could not glean this fact from the petitioner's papers—that, under the instructions of the Appellate Division, the Trial Court gave a full and fair charge with respect to the minimal responsibility that the New York law places upon a young child with respect to her own duty of due care. Petitioner argued in the Court of Appeals that the Court decisions putting some minimal responsibility upon a five year old child should be overruled but the Court of Appeals rejected that contention. It seems clear that this issue poses only a question upon which the decisions of the highest Court of the State are final.

## CONCLUSION

**The petition for a writ of certiorari should be denied in all respects.**

Respectfully submitted,

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THOMAS GRIMES,
*On the Brief.*